View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Louisiana State University: DigitalCommons @ LSU Law Center

Louisiana Law Review

Volume 9 | Number 3
March 1949

Constitutional Law - Religious Instruction in Public Schools

James P. Norris

Repository Citation

James P. Norris, *Constitutional Law - Religious Instruction in Public Schools* , 9 La. L. Rev. (1949)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol9/iss3/6

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Notes

CONSTITUTIONAL LAW—RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS—A taxpayer, whose young son attended the public schools, brought an action for a writ of mandamus to require the board of education to prevent the instruction in and the teaching of religious education in all public schools and in all public school houses when occupied by public schools. The writ was denied by the Illinois Supreme Court.[1] That decision was reversed by the United States Supreme Court and remanded with directions. *Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois,* 333 U. S. 203, 68 S.Ct. 461, 92 L.Ed. 451 (1948).

Specifically, the action was brought to abolish the "released-time" program of the school system of Champaign County, Illinois. Prior to the inception of this plan, the school week was organized so that there was one free hour during the week which was to be used at the teachers' discretion. With the introduction of this program, part of this hour was utilized for the presentation of religious lessons developed and subsidized by the local council on religious education. The teachers of these classes were paid by the council; however, their academic qualifications were subject to the approval of the superintendent of schools. The classes were held in the regular school classrooms, after the dissenters had withdrawn. The pupils attended these classes only upon the written permission of their parents,[2] but those who had chosen to attend were subject to an absentee report which was submitted to the secular school authorities.

The governing findings of fact by the Supreme Court were (1) the use of tax-supported property for religious instruction and (2) the close cooperation between the school authorities and the religious council in promoting religious education. Justice Black, the author of the majority opinion, found the plan squarely under the ban of the "establishment of religion" clause of the First Amendment, which is made applicable to the states by the Fourteenth Amendment.[3] His interpretation of this clause was

1. People ex rel. McCollum v. Board of Education of School District No. 71, 396 Ill. 14, 71 N.E.(2d) 161 (1947).

2. Parents could choose between classes conducted by the Jewish, Protestant and Catholic faith.

3. Cantwell v. Connecticut, 310 U. S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218, 128 A.L.R. 1352, 1356 (1940). See Notes (1947) 8 LOUISIANA LAW REVIEW 136, n. 1, and (1947) 33 Corn. L.Q. 122, for additional citations.

the same as that which he proclaimed in the *Everson* case[4] of the preceding year.

It is not here intended to consider the legislative history of the enactment of this controlling clause of the First Amendment as differentiated from the subsequent erroneous judicial interpretation of its enactment and purpose.[5] But erroneous as its foundation may be, the supreme court's pronouncement is that the First Amendment not only forbids Congress to establish a national religion, to aid one religion, or to prefer one religion over another, but also forbids aid of all religions. No tax, large or small, can be levied to support any religious activities or institutions.

This interpretation is not substantiated by history, past decisions,[6] nor by the purported fathers of the doctrine of "separation of church and state," Jefferson and Madison.[7] The Supreme Court's method is strictly legislative. It interprets church-state relations on the basis of what it deems to be wise and prudent, as legislatures do, not on what is the law of the nation. This has been the trend of this Court for more than a decade. Strange as it may seem, Justice Black himself, in a dissenting opinion in *Adamson v. California*,[8] pointed out that the Constitution is being undermined by such tactics. If the charter of our government needs changing, let it be changed by the legally provided methods.

Even in view of these ominous-sounding tones, perhaps it is unfair to condemn the court too vociferously for the decision in this case. It perhaps thought rather strong language necessary to show the stand it intended to take upon any relationship of church and state, similar to this particular plan, which may

4. Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392 (1947).

5. Dissenting opinion of Justice Reed in the presently discussed case; 1 Annals of Congress 434, 730; Hunt, Life of James Madison (1902) 1012; Comment (1948) 36 Geo. L. J. 631. Contra: Comment (1947) 21 So. Calif. L. Rev. 61.

6. The writer of the majority opinion is unable to cite one applicable case to substantiate his interpretation.

7. See note 5, supra.

8. After expressing his conviction that the entire Bill of Rights was made applicable to the state by the Fourteenth Amendment, Justice Black says, "To hold that this court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." Adamson v. California, 332 U. S. 46, 89, 67 S.Ct. 1672, 1695, 91 L.Ed. 1903, 1929, 171 A.L.R. 1223, 1249 (1947). Accord: "This court is forever adding new stories to the temple of constitutional law, and the temples have a way of collapsing when one story too many is added." Justice Jackson concurring in Douglas v. City of Jeannette, 319 U.S. 157, 181, 63 S.Ct. 877, 889, 87 L.Ed. 1324, 1338 (1942). The same opinion is a dissenting opinion in Murdock v. Pennsylvania, 319 U.S. 105, 117, 63 S.Ct. 870, 877, 87 L.Ed. 1292, 1301,146 A.L.R. 81, 109 (1943).

eventually lead to religious strife and discord. Yet one can but wonder over the language itself. Potentially, and without straining an interpretation, the applicability of this decision could be made to declare all released time programs (now involving over 2,000,000 school children[9] in forty states)[10] unconstitutional. It could rid the armed service of its chaplains, and could banish the chapels and religious student centers from the campuses of all state subsidized schools.[11] In short, any relation between religion per se and the state whereby religion would be the direct or indirect, or even the incidental, beneficiary of an expenditure of the tax funds, or of official support, aid or encouragement could be declared unconstitutional.

Justice Jackson, in a concurring opinion in this case, looks to the immediate effects of the decision. He voices the opinion that the supreme court has set itself up as a "super board of education" for every school district in the nation. He also realizes that this "super board" is likely to be called upon by a plaintiff to compel the public schools to sift out of their teaching everything inconsistent with his personal religious beliefs.[12]

But from an optimistic, and it is believed, realistic, viewpoint, the above-expressed fears are ill-founded. Never before, as it is now, has the reading public been unrelentingly bombarded with printed matter proclaiming that the only logical end-result of a supreme court's decision would be, from one viewpoint, the destruction, and from the other viewpoint, the salvation, of our most sacred religious heritages. The first contention is perhaps

9. Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Ill., 333 U.S. 203, 224, 68 S.Ct. 461, 472, 92 L.Ed. 451, 463 (1948).

10. Gordon v. Board of Education of the City of Los Angeles, 78 Cal. App.(2d) 464, 479, 178 P.(2d) 488, 497 (1947).

11. The following Louisiana constitutional provisions lend themselves more readily to the decisive language of the *McCollum* case than does the First Amendment. "Every person has the natural right to worship God according to the dictates of his own conscience. No law shall be passed respecting an establishment of religion, nor prohibiting the free exercise thereof; nor shall any preference ever be given to, nor any discrimination made against, any church, sect, or creed of religion or any form of religious faith or worship." La. Const. of 1921, Art. I, § 4.

"No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion. . . . No appropriations from the State treasury shall be made for private, charitable, or benevolent purposes to any person or community." La. Const. of 1921, Art. IV, § 8.

"No public funds shall be used for the support of any private or sectarian school." La. Const. of 1921, Art. XII, § 13.

12. 333 U.S. 203, 234, 237, 68 S.Ct. 461, 476, 478, 92 L.Ed. 451, 468, 469 (1948). The relator in this case is an avowed atheist and she has asked that the courts not only end the "released time" plan but also ban every form of teaching which suggests or recognizes that there is a God.

wrong because of ecstatic zeal, the second is wrong because of gross misunderstanding.

Justice Frankfurter correctly prognosticates the future treatment of this problem by observing that the mere formulation of a relevant constitutional principle is the beginning of the solution of a problem, not its answer.[13] The meaning of this "separation" doctrine shall be unfolded as appeal is made to the principle from case to case. It is to be hoped that this doctrine will officially come to express, not absolute separation, but the more practical relationship between church and state, which to a tangible extent has existed in this country—that of distinction and cooperation.[14]

The Supreme Court could well consider this excerpt from *Gordon v. Board of Education of the City of Los Angeles* upon the presentation of the next released time program:

> "No one. . . can deny that instruction of the youth of the state in faith and morality is of utmost necessity and importance. All too regretfully it must be said that in present-day American life the family as a unit has not done its part in this vital field of education of our boys and girls. Else juvenile courts would not be groaning under an avalanche of cases of derelictions of children. What more logical advance could be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from school for one hour a week. . . ."[15]

Most probably that is the type of reasoning which shall be utilized to give supreme judicial approbation to a less involved program than that found in Champaign County. If, however, the opposite judicial trend should begin to develop to an alarming degree, these words of Justice Jackson in *Murdock v. Pennsylvania*[16] may be efficaciously called to the judicial mind: "Civil liberties had their origin and must find their ultimate guaranty

13. 333 U. S. 203, 212, 68 S.Ct. 461, 466, 92 L.Ed. 451, 457.

14. As implied by the dissent of Justice Reed in this case and in Chance v. Mississippi, State Text Book Rating and Purchasing Board, 190 Miss. 453, 200 So. 706 (1941). But the doctrine is more specifically announced, developed and documented in Parsons, The First Freedom (1948).

15. Gordon v. Board of Education of the City of Los Angeles, 78 Cal. App.(2d) 464, 479, 178 P.(2d) 488, 497 (1947).

16. Douglas v. City of Jeannette, 319 U. S. 157, 181, 63 S.Ct. 877, 889, 87 L.Ed. 1324, 1338 (1942). The same opinion is a dissenting opinion in Murdock v. Pennsylvania, 319 U. S. 105, 117, 63 S.Ct. 870, 877, 87 L.Ed. 1292, 1301, 146 A.L.R. 81, 109 (1943), cited supra note 9.

in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want."—with the reminder that the converse of that last sentence is also true.

JAMES P. NORRIS, JR.

CRIMINAL LAW AND PROCEDURE—ATTEMPT AND CONSPIRACY SEPARATE INCHOATE OFFENSES—RELIEF BY HABEAS CORPUS—Duhon was convicted of an "attempt to conspire to commit simple burglary." He claimed that attempted conspiracy is not a crime and that the sentence and imprisonment were illegal. Without filing a motion in arrest of judgment or taking an appeal, relator sought extraordinary relief by a writ of habeas corpus. *Held*, the sentencing court was without jurisdiction ratione materiae and the relief prayed for was properly granted by the district court. *State of Louisiana ex rel. Clarence Duhon v. General Manager, Louisiana State Penitentiary*, La. Sup. Ct. Docket No. 39,091 (July 20, 1948).[1]

In holding that the criminal code does not contemplate an offense of attempted conspiracy, Judge Holcombe, whose opinion was approved without discussion by the supreme court, stressed the fact that both criminal conspiracy[2] and attempt[3] are found in Chapter V of the criminal code which sets out "inchoate offenses." In these offenses the offender has not completed the basic crime intended, but is punished because he had a specific intent to commit the crime and progressed far enough along the road toward its commission that liability should attach.[4]

By virtue of the attempt and conspiracy articles being similarly treated as general inchoate offenses, it must naturally follow that they were intended to be applied separately and must relate to a specific basic crime. Stressing the language of Article 3, which provides that "The articles of this code cannot be ex-

1. Decided by Division A of the Nineteenth Judicial District Court and affirmed with the comment that the opinion was correct by the Louisiana Supreme Court. No record of the affirmation has yet been published.

2. Art. 26, La. Crim. Code of 1942.

3. Art. 27, La. Crim. Code of 1942.

4. "An attempt is committed where the offender had a specific intent to commit the crime and went beyond the zone of preparation. A conspiracy is committed where the offender had a specific intent to commit the crime, combined with others for that purpose, and committed some act in the furtherance of that object which might or might not be enough to constitute an attempt. . . . both of these general criminal concepts were intended to cover a party who specifically intended to commit one of the basic crimes listed in the Criminal Code, or elsewhere, but might have been apprehended before he was able to carry out that criminal purpose." Opinion of Holcombe, J., p. 2.